

1988

State of Utah v. P. L. Dixon : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 880277-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Respondent,

vs.

P. L. DIXON,

Defendant and Appellant.

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Case No. 880277-CA

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Priority 2

:

APPELLANT'S BRIEF

Appeal from the Judgment of the
Circuit Court in and for Juab County,
Nephi Department, State of Utah
The Honorable Robert J. Sumsion, Presiding

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Respondent,

vs.

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal is conferred upon the Utah Court of Appeals pursuant to Section 78-2a-3(2)(d) Utah Code Annotated (1953 as amended).

STATEMENT OF NATURE OF PROCEEDINGS

This is an appeal from a conviction of speeding in the Circuit Court.

STATEMENT OF THE ISSUES

The court erred when it prohibited counsel for defendant from cross-examining the State's witness about a subject raised by the State, thereby denying defendant the constitutionally guaranteed right of confrontation as provided for in the Sixth Amendment of the Constitution of the United States as applicable to the States by the 14th Amendment and as well Article 1 Section 12 of the Constitution of Utah, which is codified in Utah Rules of Evidence Rule 611(b).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Constitution of Utah Article 1 Section 12:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Rules of Evidence Rule 611(b):

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Section 41-6-46 Utah Code Annotated, 1953, as amended:

41-6-46. Speed regulations - Safe and appropriate speeds at certain locations - Prima facie speed limits - Emergency power of the governor.

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, including, but not limited to when:

(a) approaching and crossing an intersection or railroad grade crossing;

(b) approaching and going around a curve;

(c) approaching a hill crest;

(d) traveling upon any narrow or winding roadway; and

(d) special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(2) Where no special hazard exists, and subject to Subsection (3) and Sections 41-6-47 and 41-6-48, the following speeds are lawful. Any speed in excess of these limits is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

(a) twenty miles per hour when passing a school building or its grounds during school recess or while children are going to or leaving school during opening or closing hours, except that local authorities may require a complete stop before passing a school building or grounds at any of these periods;

(b) twenty-five miles per hour in any urban district; and

(c) fifty-five miles per hour in other locations.

(3) The Governor by proclamation in time of war or emergency may change the speed limits on the highways of the state.

STATEMENT OF THE CASE

Nature Of The Case

Defendant appeals from the judgment of conviction in the Circuit of the offense of speeding.

Course Of Proceedings And Disposition At Trial Court

This case was initially tried in the justice's court in and for Juab County wherein defendant was found guilty. On trial de novo in the Circuit Court, Juab County, Nephi Department defendant was found guilty.

Statement Of Facts

On September 27, 1987 defendant was stopped and cited by Trooper Ron Law, (hereinafter Law) of the Utah Highway Patrol for speeding (Transcript of Trial Page 35, hereinafter T.35). At trial Law testified, in response to the prosecutions inquiry, as to what he believed to be a "safe and reasonable" speed (T.41). Defense counsel attempted to cross-examine Law with regards to the basis of his opinion however was prevented by the court (T.56, T.62, T.70, T.78, T.80, T.82). At no point in the trial was counsel allowed to delve into this area.

Law testified that he verified his own speed as displayed on the radar as compared with his speedometer (T.37). When defense counsel attempted to cross-examine with regards to any discrepancy and the significance of any discrepancy in the readings he was prevented by the court (T.53). Law testified that he used an "instruction manual" (T.39). When defense counsel attempted to cross-examine Law, about the manual he identified as the operators manual for the radar he had used on the date in question (T.57), the court prevented counsel from doing so (T.59).

SUMMARY OF THE ARGUMENT

The trial court erred and abused it's discretion by impermissably limiting or prohibiting cross-examination. When, as in this case, a party opens up a subject on direct examination the opposing party, here the defendant, should be allowed great latitude in cross-examination. This latitude is not without restrictions, however, cross-examination should be permitted to explain, contradict, or discredit testimony presented on direct examination.

The right of an accused to confront his accusers is a fundamental right guaranteed to every defendant. It is essential to a fair trial. The trial court should only limit cross-examination when the subject has been adequately exhausted.

The speed limit in Utah is not an absolute speed limit. It is one limited by the attendant conditions and one cannot exceed what is reasonable and prudent. (See Utah Code Annotated 41-6-46 (1953 as amended).) When Law testified as to what he thought was reasonable and prudent (T.41) the defendant should have been allowed great latitude to test this testimony, however, defendant was prevented from so doing (T.56, T.62, T.70, T.78, T.80, T.82). This, along with other instances as previously enumerated (see Statement of Facts), prejudiced defendant and prevented defendant from receiving a fair trial. The defendant need not show prejudice since denial of cross-examination is a constitutional error of major proportions.

ARGUMENT

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN UNDULY LIMITING DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S WITNESS

The facts of this case are quite simple. The argument is equally simple.

In State v. Jarrell, 608 P.2d 218, 228 (Utah 1980) the Utah Supreme Court ruled that "Broad discretion is allowed in cross-examination of a defendant who opened up an area on direct examination." (emphasis added). The court reasoned that if a defendant were to take the stand to testify in his own behalf that for purposes of cross-examination he should be treated as any other witness. Quoting State v. Green, 578 P.2d 512, 514 (Utah 1978) they said, speaking of the defendant:

...he then becomes subject to being treated the same as any other witness. This includes cross-examination on any matter which would tend to contradict, explain or cast doubt upon the credibility of his testimony. Furthermore, any testimony or evidence which is purposed to those same objectives may be introduced in rebuttal. (Jarrell at 228).

This fundamental right of cross-examination is so essential to the fair administration of justice that even a defendant in criminal proceedings is subject to liberal cross-examination when he takes the witness stand in his own behalf.

The scope of cross-examination of witnesses is generally governed by Utah Rules of Evidence Rule 611(b):

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

At an absolute minimum it permits cross-examination on the subject matter of

the direct examination.

The following are specific examples of where the defendant was prohibited from even pursuing a semblance of cross-examination of the State's witness even after the State had opened a subject up.

Law testified, in response to the prosecutions inquiry, as to what he believed to be a "safe and reasonable" speed (T.41). Defense counsel attempted to cross-examine Law with regards to the basis of his opinion however was prevented by the court (T.56, T.62, T.70, T.78, T.80, T.82). At no point in the trial was counsel allowed to delve into this area.

Law testified that he verified his own speed as displayed on the radar as compared with his speedometer (T.37). When defense counsel attempted to cross-examine with regards to any discrepancy and the significance of any discrepancy in the readings he was prevented by the court (T.53).

Law testified that he used an "instruction manual" (T.39). When defense counsel attempted to cross-examine Law, about the manual he identified as the operators manual for the radar he had used on the date in question (T.57), the court prevented counsel from doing so (T.59).

Each of these three examples have one thing in common -- the State opened the subject up on direct and the defendant was prevented from cross-examining thereon.

The right of cross-examination is an integral part of the right of confrontation which is guaranteed by Article I, Section 12, Constitution of Utah and the Sixth Amendment of the Constitution of the United States. The cross-examination of a witness, testifying against the accused, provides a means of attacking his credibility and thus the substance of his testimony.

State v. Chesnut, 621 P.2d 1228, 1233 (Utah 1980). The trial court

unduly restricted defendant's cross-examination.

Jury Instruction No. 3 (T.90) provided in part that "you are the exclusive judges of the credibility of the witness...". Cross-examination is most essential to assist the jury in determining a witnesses' credibility.

Cross-examination should be confined to the matter concerning which the witness has been examined in chief but such rule should be liberally construed so as to permit any question to be asked on cross-examination which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief or to test his accuracy, memory, skill, veracity, character or credibility. Lewis v. State, 458 P.2d 309 (Okla. Cr. 1969).

In Jarrell (supra at 230) the court says:

Clearly defense counsel must be allowed ample elbowroom in conducting cross-examination. In this case the trial court might well have been more liberal in permitting cross-examination to proceed uninterrupted, even though the defense counsel's questions were not phrased in a classic textbook fashion.

Here it is well demonstrated that the form of the question is less critical than is the substance and the defendant's right to cross-examine.

In Brookhart v. Janis, 384 U.S. 1; 16 L.ed 2d 314; 86 S.Ct. 1245 (1965), the Supreme Court endorsed and embraced the respondents statement when it was said that:

"[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

This concession is properly made. The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

This position was reinforced by the court in Smith v. Illinois, 390 U.S. 129, 131; 19 L.ed 2d 956; 88 S.Ct. 784 (1968), and has been echoed by the Utah

Supreme Court:

Since the trial court unduly restricted defendant in the exercise of his constitutional right of cross-examination, the review thereof is controlled by the constitutional harmless error standard of Chapman v. California. This standard compels reversal unless the reviewing court can declare a belief that the error was harmless beyond a reasonable doubt. Chesnut (supra at 1233).

Law testified that on the day of the citation and at the time and place of the violation the following conditions existed:

1. There was one other vehicle that I could see that was a mile-and-a-half or so, behind that defendants vehicle. (T.38, T.42, T.75);

2. In that general area, it's fairly straight. It's a little bumpy, but fairly straight and level. (T.38, T.44, T.75);

3. In that area, I guess you would call it farm ground, farms and fields. (T.38);

4. Its [the highway] fenced on both sides. (T.43)

5. Q. Any rocks or outcroppings on the side of the road?

A. No. (T.43);

6. Its not legally open range. (T.43);

7. Livestock on both sides. As I recall, at that time, there wasn't any right close to the highway... (T.39);

8. I would deem it [defendant's vehicle] new. (T.74);

9. Q. Is it [defendant's vehicle] built for speed, in your understanding?

A. As I understand, it is, yes. (T.75).

On page 80 of the Transcript Law testified that as far as he was concerned he could travel at excessive speeds and did not feel that he was

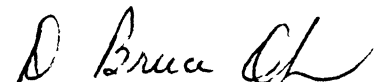
unreasonable or unprudent.

CONCLUSION

The State did not sustain it's burden of a prima facie case as is contemplated by Section 41-6-46 Utah Code Annotated (1953 as amended). The court erred and abused it's discretion in not allowing cross-examination of the State's witness.

Defendant respectfully seeks an order of the court reversing the trial court's judgment and dismissing or in the alternative remanding for a new trial.

Respectfully submitted this 28 day of October, 1988.



D. Bruce Oliver
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this ____ day of October, 1988, to Donald J. Eyre, Juab County Attorney, 125 North Main Street, Nephi, Utah 84648.
